Office-Supreme Court, U.S.
FILED
NOV 3 1966
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In the Supreme Court of the United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioners,

vs.

COLLINS G. REED and MRS. COLLINS G. REED,
et al,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for a Writ of Certiorai to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI

Mondakota Gas Company, petitioner, prays that a writ of Certiorari issue to review the judgment and order of the Ninth Circuit Court dated August 2, 1966, affirming the judgment of the United States District Court for the District of Montana.

OPINION BELOW

The order affirming the judgment of the District Court is reported in 244 F Supp. 327.

JURISDICTION

The judgment of the Court of Appeals was entered on the 2nd day of August, 1966. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

(1) If Respondent relies upon a dismissal of two prior cases as being res judicata does the evidence of such cases presented to the District Court, including the recorded contract made a part of the complaint and upon which the complaint is based, constitute proof of the contract so that the District Court, on a motion for Summary Judgment, is bound to the fact of recording and constructive notice thereof to a subsequent purchaser, i.e. the Respondent herein, so as to constitute a material issue of fact.

(2) If prior cases are settled by agreement, but not dismissed without prejudice, do the cases thereby become moot and not res judicata, so, that the District Court should receive evidence of a subsequent judgment in a third action on the same subject matter cancelling the recorded contract referred to in No. 1 above, which Decree shows the chain of title and which is recorded in accordance with the state law.

(3) Should the District Court have ordered discovery pending appeal when it is shown that the Respondent is a relative of the business partners of the defendant in prior cases, which were settled by agreement, from whom Respondent's title is obtained, when the conditional con-

tract was later cancelled by Court Decree by reason of the agreement which settled the cases referred to in No. 1, above.

STATUTES INVOLVED

Section 63-204, Revised Codes of Montana, 1947.

PARTNERSHIP CHARGED WITH KNOWLEDGE OF OR NOTICE TO PARTNER.

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

73-201, Revised Codes of Montana, 1947.

RECORD—TO WHOM NOTICE RECORDING COPIES.

Every conveyance of real property acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers, and mortgagees; and a certified copy of any such recorded conveyance may be recorded in any other county, and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance.

Section 73-202, Revised Codes of Montana, 1947, provides that the instrument first recorded prevails.

Section 93-1101-21, Revised Codes of Montana, 1947, provides that an instrument recorded in the county clerk's office is admissable in evidence.

Section 93-3005, Revised Codes of Montana, 1947, provides for the filing of a notice of pendancy of an action affecting the title to real property, commonly called a Lis Pendens which constitutes constructive notice from the time of filing. This is also provided for in Section 93-6205, Revised Codes of Montana, 1947.

STATEMENT

The District Court had jurisdiction because there is diversity of citienship and the amount in litigation exceeds $10,000.00. U.S.C.A. 1332.

The questions involved in this case are whether or not a material issue of fact remains so that summary judgment should not have been granted to the defendant Collins Reed, and secondly, whether or not a new trial should have been granted upon the motion for new trial which includes the question whether or not the District Court should have ordered further discovery procedure during the pendency of the appeal or during the period of hearing the motion for new trial.

These questions are raised first, by the motion for new trial as to the findings of the trial court and by appeal from the summary judgment herein, with reference to the chain of title of the defendant Collins Reed upon which the trial court predicated the judgment against

the plaintiff. A subsequent judgment of the District Court of the State of Montana in and for the County of Yellowstone, cause No. 28573, entitled Mondakota Gas Co. -v-Industrial Gas Inc., was entered and recorded in Book 665 of Judgments and Decrees, page —, on May 17, 1965, of Fallon County, Montana, wherein the property is located. This judgment cancelled a contract of sale by Petitioner against E. L. McElroy, who had assigned his interest therein to Industrial Gas. Co. The claim of Collins Reed is based on a transfer from McElroy of an oil and gas lease included in the contract, but which is subsequent to the recording of the contract. McElroy had obtained a second assignment of the oil and gas lease from other corporate officers when he stated he lost the first one, but which did not include a clause that it was subject to the contract. This was never recorded, nor were the later assignments to Buchtel and then to Reed. McElroy was a business partner of one Edward Markey, and he is the brother-in-law of Reed, and Buchtel was the brother-in-law of McElroy. Affidavits were filed showing this in support of the motion for a new trial.

In 1952 Petitioner agreed to sell property to McElroy, one parcel of which is the leasehold interest herein. The contract was recorded, and to comply with Federal regulations an assignment was given to McElroy subject to the terms of the recorded contract. McElroy said he lost it and obtained another one which he prepared but not reciting it to be subject to the recorded contract. In 1953 McElroy made the assignment mentioned above.

The chain of title begins within a common owner, the petitioner herein, who sold to E. L. McElroy under a conditional agreement covering the real property interest involved herein, situate in Fallon County, Montana, to-wit:

W½, Section 18, Township 8 North,
Range 60 East, M.P.M., and
NE¼, Section 25, Township 8 North,
Range 59 East, M.P.M.

RECORDED INSTRUMENTS

Mondakota Gas Co. Chain

Purchase Agreement from Mondakota Gas Company to E. R. McElroy dated June 17, 1952, recorded in Book 30, pages 4-24, records, Fallon County, Montana, recorded Jan. 12, 1953, at 9:35 a.m..

Collins Reed Chain

Purchase Agreement from Mondakota Gas Company to E. R. McElroy dated June 17, 1952, recorded in Book 30, pages 4-24, records, Fallon County, Montana, recorded Jan. 12, 1953, at 9:35 a.m.

There are assignments which were presented by Reed to the Secretary of Interior but which have never been recorded in the clerk's office.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted because the District Court failed to follow the Montana law applicable to the recording instruments affecting real property (cases in 2 below) and is contrary to 28 U.S.C.A. 1652.

2. The decision is contrary to the following Montana law:

Sec. 63-204 RCM 1947; Sec. 73-201 RCM 1947; Sec.

73-202 RCM 1947; Sec. 93-1101-21 RCM 1947; Sec. 93-3005 RCM 1947; Sec. 93-6205 RCM 1947.

Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218, P. 949.

Kelley v. Grainey, 113 Mont. 520, 129 P. 2d 619.

3. The decision below is in conflict with the prior decision of the 9th Circuit, ie. U.S. v. Viewcrest Garden Apts., (1959) 268 F. 2d 380.

4. The decision is in conflict with other federal court decisions, ie. Peckham v. Ronrico Corp. (CA 1st 1948) 171 F2 653; Associated Press v. U.S. (1945) 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013; Elgin J. & E. Ry. Co. v. Burley (1945) 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; Doehler Metal Furniture Co. v. U.S. (CCA 2d, 1945) 149 F2d 130; Whitaker v. Coleman (CCA 5th 1940) 115 F2d 305; Ishikowa v. Acheson, Secretary of State, 90 F. Supp. 713; Jones v. U.S., 279 F2d 433, Cert Den. 81S. Ct. 226, 364 U.S. 893, 5 L. Ed. 2d 190; and Hardue v. Hayaski, 282 F2d 599.

5. The decision is in conflict with other Federal Court decisions granting discovery pending on apeal and a new trial, ie. Elliot & Sons v. King & Co., 22 F.R.D. 280, applying Rule 27 F.R.C.P.; Fried v. McGrath, 133 F2d 350; Aetna Casualty & Surety Co. v. Yeatts, 122 F2d 350; Hagen v. U.S. (9th Cir.) 153 F2d 850; Gile v. Duke (9th Cir.) 5 F2d 952.

6. The decision denies to petitioner the right to a trial on the merits and issues joined by the application of the doctrine of res adjudicata where it is shown prima facia by the subsequent judgment that the two prior cases claim-

ing a breach of the agreement of purchase were settled by an assignment of the property in the contract to Industrial Gas Co. by McElroy, rendering the two prior cases moot.

ARGUMENT

This writer did not have the benefit of trying this case in the District Court, having been retained later for the motion for new trial. From examination of the lower court proceedings it appears that this is just one part, or claim, involved as other parties were involved concerning other claims.

It is the opinion of counsel that the substantive law applicable to the present case is so fundamental that perhaps prior counsel did not "hammer it home" in the lower court. The decision goes off on procedure, not recoginzing that the two prior cases to cancel the contract, which were presented by Reed to invoke res adjudicata under Rule 41 (b), included the recorded contract which is prior in time to the attempted assignment by McElroy to his business partner and relation. See Secs. 73-201, 73-202, 63-204, 93-3005 and 93-6205 RMC 1947, regarding constructive notice, notice to a partner and lis pendens. A quiet title action and lis pendens is proper Montana procedure to litigate oil and gas leases and royalties. Schumacher v. Cole, 131 Mont. 166, 309 P. 311.

The trial court had the proof of the recorded contract before it, and this created a material issue of fact which precludes the granting of a Summary Judgment under Rule 56. In addition, the motion for a new trial shows the time and fact of the business partnership and relation-

ship of the assignees of McElroy, who had died before the trial court judgment, and by Sec. 63-204 R.C.M. 1947, the notice of the contractual obligations of conditional purchase are imputed, so as to preclude any assignee from being a bona fide purchaser. Also, the contract was of record and this creates constructive notice.

"Rule 56 should be cautiously invoked to the end that the parties may always be afforded a trial where there is a bona fide dispute of facts between them." **Associated Press v. United States (1945), 326 U.S.I., 65 S. Ct. 1416, 89 L. Ed. 2013.**

"If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained." **Elgin J. & E. Co. v. Burley (1945), 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886.**

"A litigant has a right to a trial where there is the slightest doubt as to the facts." **Peckham v. Ronrico Corp. (1948 C. A. 1st), 171 F. 2d 653, 657.**

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. **A litigant has a right to a trial where there is the slightest doubt as to the facts,** and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. **The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered." Doehler Metal Furniture Co. v. United States (CCA 2d, 1945), 149 F 2d 130, 135.** (Emphasis supplied.)

". . . Summary judgment procedure is not a catch

penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. **Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial,** it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." **Whitaker v. Coleman (CCA 5th 1940), 115 F 2d 305.** (Emphasis supplied.)

There was newly discovered evidence which could only be found to exist by facts available in states other than Montana as the attempted assignees are not Montana residents. This is apparent because there is diversity of citizenship for federal jurisdiction.

". . . The showing of the alleged newly discovered evidence need not present an air-tight case. It suffices if a showing is made of sufficient new facts to afford a basis for believing that, given an opportunity, the concrete proof could reasonably be expected to cover the gaps and to fill in the details. I believe such a showing has been made here, and it can be left to the matter of proof to supply the specific details." **Ishikawa v. Acheson, Secretary of State, 90 F. Supp. 713.**

"This remedial procedure, a motion for a new trial based upon after-discovered evidence, is designed to serve the ends of justice." **Jones v. U. S. 279 F 2d 433, cert. den. 81 S. Ct. 226, 364 U. S. 893, 5 L. Ed. 2d 190.**

In Elliot & Sons v. King & Co., 22 F.R.D. 280, at page 282, it was said that the District Court should order discovery under Rule 27 even though there is an appeal pending.

In the case of Fried v. McGrath, 133 F. 2 350, Judge

Edgerton made the hereinafter quoted observation by granting a new trial on grounds not stated in the original motion, which quotation is set forth in Moore's, Vol. 6, page 3850, as follows:

> "'There is no logical or legal difficulty in granting for one reason a motion made for another reason. And it seems to me a contradiction in terms to say, when a judge grants a party's motion, that he nevertheless acts upon his own motion; or, what comes to the same thing, that he acts of his own initiative. If he grants the party's motion he does not act of his own initiative; and vice versa.' Rule 59(d) clearly expresses this dichotomy: 'the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party . . .'"

In Aetna Casualty & Suretoy Co. v. Yeatts, 122 F. 2 350, Judge Parker stated as follows:

> "'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.'" (Emphasis supplied.)

The case of Hagen v. U. S., 9th Circuit, 153 F. 2 850, and Gile v. Duke, 9th Circuit, 5 F. 2 952, the plaintiff was allowed to reopen his case after a nonsuit so as to supply certain defects and omissions in his proof.

In the case of Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 P. 949, at page 951, it was stated as follows (See Sec. 73-201 and 73-202 R.C.M. 1947):

The subsequent judgment rendered the two prior cases

moot by reason of the assignment by McElroy to Industrial Gas Co. Perhaps prior counsel should have moved to dismiss without prejudice, but to hold that even though a controversy is settled it really isn't, in effect nullifies all forms of reason and common sense and does not do the justice required by law.

The case of Hagen v. U. S., 9th Circuit, 153 F. 2 850, and Gile v. Duke, 9th Circuit, 5 F 2 952, the plaintiff was allowed to reopen his case after a nonsuit so as to supply certain defects and omissions in his proof.

In the case of Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 P. 949, at page 951, it was stated as follows (See Sec. 73-201 and 73-202 R.C.M. 1947):

> "In the instant case the option recorded in the Miscellaneous Record Book was recorded as prescribed by law." Stephen v. Patterson, 21 Ariz. 308, 188 Pac. 131.
>
> "Since the option was an instrument entitled to be recorded, and was recorded as prescribed by law, it imparted constructive notice of its contents of Mrs. Guerin, who was a subsequent purchaser of the property affected by the option, from the time it was filed with the county clerk of Toole County on December 9, 1921. Section 6934, above. One who purchases land from the owner, after the recording of an option given by the owner to another person to purchase the same land, takes with constructive notice of the option, and cannot claim to be an innocent purchaser. Chesbrough v. Vivard Inv. Co., 156 Ky. 149, 160 S.W. 725. The option recited that the right to purchase given to Rock was 'subject, however, to one certain oil and gas lease given in favor of Gordon Campbell,' and that recital constituted a part of the contents of the option as the term 'contents' is used in section 6934 above. Taylor v.

Mitchell, 58 Kan. 194, 48 Pac. 859. But Mrs. Guerin was chargeable also with notice of all material facts which an inquiry suggested by that recital would have disclosed. Fisher v. Bush, 133 Ind. 315, 32 N.E. 924; Loser v. Savings Bank, 149 Iowa, 672, 128 N.W. 1101, 31 L.R.A. (N.S.) 1112; 2 Tiffany on Real Property, § 572. In other words, she was chargeable with notice of the contents of the Campbell lease, though it was not recorded (White v. Foster, 102 Mass. 375; Hancock v. McAvoy, 151 Pa. 439, 25 Atl. 48; 2 Tiffany on Real Property, § 572), and she could not rely upon the representation by Mrs. Thornton that there was not any outstanding lease upon the property (Bergstrom v. Johnson, 111 Minn. 247, 125 N.W. 899; Waggoner v. Dodson, 96 Tex. 415; 73 S.W. 517; 39 Cyc. 1714)." (Emphasis supplied.)

In Kelly v. Grainey, 113 Mont. 520, 129 P 2d 619, at 626, it is stated as follows:

"In the words of Chief Justice Brantley in Foster v. Winstanley, 39 Mont. 314, 102 P. 574, 579, 'a bona fied purchaser is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside,'' etc. Helena & Livingston S. & R. R. Co. v. Northern Pac. R. Co., 62 Mont. 281, 205 P. 224, 21 A.L.P. 1080; Yale Oil Corp. v. Sedlacek, 99 Mont. 411, 43 P. 2d 887.

"Thus, even if we consider defendant's testimony as showing that she received plaintiff's property from Mae J. Kelly in good faith in consideration for a promise to support their mother, she was not a bona fide purchaser so as to defeat plaintiff's title."

The case of United States v. Viewcrest Garden Apartments, (9th Cir. 1959) 268 F. 380, holds that the state recording law governs, and stated thusly (on pages 382 and 383):

"• • • Thus state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved. It is commercially convenient to adopt existing state systems as it saves the expense of setting up a whole new federal recording system and it enables persons checking ownership interests in property to refer to one set of record books rather than two."

The rule is that any recorded instrument under state law imports notice to any subsequent purchasers or encumbrancers. The recorded contract between plaintiff and McElroy put defendant on notice so that he cannot be a bona fide purchaser.

A partner is charged with knowledge of what the other partner knows. Sec. 63-204 R.C.M. 1947. The terms of the purchase agreement of McElroy on June 17, 1952, are chargeable to Markey. Since Markey is a brother-in-law of appellee Collins Reed, and Buchtel the brother-in-law of McElroy, it is obvious the chain of title is between business associates and relatives. These parties cannot be bona fide purchasers, especially since they all have notice, actual or constructive, by the recording of the purchase agreement to McElroy, which he assigned to Industrial Gas and which was terminated.

The issue of who is the record owner, or who is entitled to the leasehold interest has always been involved in the case. The motion for new trial as amended, supplied the proof that the two prior cases were not in fact res adjudicata and also proved the entire chain of title.

"In federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved." U. S. v. Hardue Hayaski, 282 F 2, 599, 601.

The record in this case is complex and cluttered because it involved other unrelated claims. Perhaps all of them should not have been joined, but that should not preclude a litigant from consideration of all offered evidence, whether it be "hidden" behind an order of dismissal in the pleadings of other cases (ie. the contract of June 17, 1952) or newly discovered and presented at a motion for new trial.

CONCLUSION

The petitioner respectfully contends that on the basis of the record the trial court, in the aid of the appeal, and in aid of the motion for new trial should have granted the appellant's motion for discovery procedure. In addition, it would appear that under Rule 56, the trial court should have granted summary judgment, and should have granted summary judgment, in favor of the petitioner, Mondakota Gas Co., for the reason that the chain of title, as recorded in the County Clerk and Recorder's office at Fallon County, Montana, shows the interest and ownership of Mondakota Gas Co. and the subsequent purchasers and particularly Collins G. Reed could receive only the interest that E. L. McElroy had and that was taken with notice of the prior recorded rights of the petitioner.

The motion for new trial seeks to show to the Court that there was fraud, failure of consideration, and actual knowledge of the facts by Reed and his predecessors in his chain of title. This, and the recorded contract, would require the court to reach a different conclusion, i.e., that plaintiff is entitled to judgment for the entire

interest of the Walker lease, subject only to the operating agreement.

Reed's title is predicated upon his predecessors title and the title of E. L. McElroy stops at the point of the contract of purchase recorded in Fallon County, Montana, which contract was assigned and then terminated and reinvested petitioner with his title.

It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for Writ of Certiorari upon all other parties, to-wit:

CALE J. CROWLEY, Esq.
CROWLEY, KILBOURNE, HAUGHEY,
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Counsel for Reed

at the address shown above by mailing six true and correct copies thereof, postage prepaid, this 28th day of October, 1966, pursuant to Rule 33 (3) (b) of the Rules of the Supreme Court of the United States.

Marvel Lowrance

Marvel Lowrance, Sec. for
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APPENDIX

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Case regarding contract and lease and rendering prior cases moot 23, 29

MONDAKOTA GAS COMPANY, Plaintiff.

v.

COLLINS G. REED, et al., Defendants.

S-W COMPANY, a corporation, Plaintiff,

v.

FIDELITY GAS COMPANY, a corporation et al., Defendants.

The FIRST NATIONAL BANK OF DENVER, COLORADO, a corporation, Trustee, Plaintiff,

v.

FIDELITY GAS COMPANY, a corporation, et al., Defendants.

Nos. 354-356.

United States District Court
D. Montana
Billings Division.

Aug. 3, 1964

On Motion for New Trial
June 4, 1965.

(That portion that refers to the Reed matter)

On Motion for New Trial of No. 354.

Plaintiff's motion to amend motion for new trial, filed April 1, 1965, is granted and the motion for a new trial is deemed amended in accordance with such motion to amend.

And the court having considered said motion for a new trial as amended, together with the affidavits and briefs in support of and in opposition to said motion,

and being fully advised in the premises,

Now, therefore, it is order and this does order that said motion for new trial as amended be and the same is hereby denied.

And the court having considered plaintiff's motion for leave to take depositions in support of motion for new trial, together with the affidavits and briefs in support of and in opposition to said motion, and being fully advised in the premises,

Now, therefore, it is ordered that said motion be and the same is hereby denied.

Summary Judgment was granted in this case and two companion cases involving similar issues in favor of all the defendants. The present motion for a new trial as amended appears to be directed only to the defendant Collins G. Reed in this case. The alleged grounds for the motion are newly discovered evidence and that there is a genuine dispute as to a material fact which would preclude the court's granting summary judgment in favor of the defendant Reed. The alleged dispute as to a material fact is said to be the validity of an assignment of the so-called Walker oil and gas lease from the plaintiff to one E. R. McElroy, dated December 5, 1952, and subsequent assignments from McElroy to Buchtel, and from Buchtel to the defendant Collins G. Reed. The depositions and discovery procedure, sought to be taken in support of the motion for a new trial, seem to deal only with the issue of the validity of the assignments from McElroy to Buchtel and from Buchtel to Reed.

In this connection it must be pointed out that if the assignment from the plaintiff to McElroy was valid, the validity of the subsequent assignments from McElroy to Buchtel and from Buchtel to Reed are immaterial as

far as the plaintiff is concerned, because if its assignment to McElroy was valid, it no longer had any interest in the oil and gas lease (except such as is preserved to the plaintiff in the judgment), and has no standing to question the subsequent assignments.

This attempt to question the validity of the assignment from the plaintiff to McElroy is made in this case for the first time on the motion for a new trial. The validity of the assignment to McElroy was not mentioned as an issue in either the pre-trial order filed October 23, 1963, or the plaintiff's motion to modify the pre-trial order which was filed December 12, 1963. As a matter of fact, at a pre-trial conference, plaintiff's then counsel conceded that the title of all of the defendants in this and the two companion cases was settled by the decision of this court in Cedar Creek Oil and Gas Company, et al., v. Fidelity Gas Co., et al., which was affirmed by the Court of Appeals in 249 F.2d 277. At that pre-trial conference the attorney for the plaintiff stated that plaintiff in this and the two companion cases was relying on breaches of the Fidelity Operating Agreements which were alleged to have occured subsequent to the final judgment in the Cedar Creek Oil and Gas case. The attack on the validity of the assignment of the Walker lease by the plaintiff to McElroy for the first time on the motion for a new trial appears to be an afterthought and that reason alone would warrant the denial of the motion for a new trial.

(5) However, the motion must be denied for another reason. In cause No. 1557 in this court, the plaintiff Mondakota Gas Company instituted an action against E. L. (Sic) McElroy, et al., to set aside the assignment of the oil and gas lease. That action was commenced Novem-

ber 4, 1953, and was dismissed for lack of prosecution on October 11, 1961. Such dismissal for want of prosecution is an adjudication on the merits under the provisions of Rule 41(b) of the Federal Rules of Civil Procedure. That action, No. 1557, is res judicata on the question of the validity of the assignment from Monadkota Gas Co. to E. L. (Sic) McElroy and the plaintiff cannot relitigate that issue in this case.

(6) Since, for the foregoing reasons, the validity of the Mondakota assignment to McElroy is established, the subsequent assignments from McElroy to Buchtel and from Buchtel to Reed are of no concern to the plaintiff and any depositions of discovery relating to the subsequent assignments would avail the plaintiff nothing. Likewise, the alleged newly discovered evidence offered as a ground for the motion for a new trial appears to go to the issue of the validity of the subsequent assignments, and does not assist the plaintiff.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mondakota Gas Company, a corporation,

Appellant,

vs.

Collins G. Reed, and Mrs. Collins G. Reed, his wife, if any; et al.,

Appellees.

No. 20,402

(August 1, 1966)

On Appeal from the United States District Court for the District of Montana, Billings Division.

Before: HAMLEY and JERTBERG, Circuit Judges, and THOMPSON, District Judge.

PER CURIAM:

The judgment and orders under review on this appeal are, and each of them is, affirmed for the reasons stated in the opinion of the district court reported in 244 F. Supp. 327.

SUPREME COURT
OF THE UNITED STATES

No. _____, October Term, 1966

MONDAKOTA GAS CO.,

Petitioner,

v.

COLLINS G. REED, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 4, 1966.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 1st day of
November, 1966.

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT COURT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

MONDAKOTA GAS COMPANY, corporation, Plaintiff, vs. INDUSTRIAL GAS INC., a corporation, Defendant.	No. 28573 Findings of Fact, Conclusions of Law, and Judgment and Decree

This matter came on regularly for trial before the court sitting without a jury on the 22nd day of April, 1965, at 9:30 o'clock a.m., the plaintiff corporation appearing in person by its officers and by its attorney of record, Daryl E. Engebregson, and the defendant not appearing in person by its officers or by attorney, pursuant to Notice of Trial duly made and entered herein.

The court proceeded to examine the files and records herein and it appearing therefrom that the case was heretofore set for trial by the court and Notice of Trial duly made and given to the defendant and to the defendant's then attorney of record and it appearing that the defendant not appearing at all at the time set for trial and on motion of the above-named plaintiff the default of the defendant for its failure to appear at the time of trial was duly entered herein according to law.

WHEREUPON, witnesses were sworn and examined on behalf of the plaintiff, and the court having received oral testimony and documentary evidence in proof of the allegations of the plaintiff's complaint without any legal objection thereto and the court having considered such

pleadings and evidence and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. This action was commenced, as appears in the amended complaint, for the purpose of obtaining judgment against the defendant for the cancellation and termination of a certain purchase agreement between the parties, for the restoration to the plaintiff of all the properties, rights, contracts and oil and gas leases mentioned in said purchase agreement, or for money damages for the reasonable value of any such properties which cannot be restored to the plaintiff.

2. That none of the property described in the purchase agreement has been restored to the plaintiff, or can be restored to the plaintiff, except as hereinafter set forth, and that all of said property, except as hereinafter set forth, has been lost to the plaintiff either by disposition by the defendant or by failure of the defendant to make certain agreed payments on mortgages, or, in the gas and oil leases, by failure to pay rentals, or by failure to pay service and transportation charges, or otherwise causing and permitting said leases and contracts to be cancelled and terminated.

3. That notice of default to cancel and terminate said purchase agreement was duly given by the plaintiff to the defendant.

4. That the plaintiff made advances in behalf of the defendant by agreement with the defendant for the obligations of defendant which defendant failed to pay in the total sum of $23,765.20.

5. That all of the allegations of the plaintiff's complaint are true.

7. The property described in the purchase agreement and not lost to the plaintiff as hereinabove mentioned are the oil and gas leases commonly known as the Kraeger Lease together with the producing gas well covering gas rights above 2,000 feet including casing, meter house and equipment incidental to said gas well, the Federal Land Bank of Spokane Lease together with a producing gas well above 2,000 feet including casing, meter house and equipment incidental thereto, the Midland Realty Co. of Minnesota Lease together with producing gas well above 2,000 feet including casing, meter house and equipment incidental thereto, and the Walker Lease, known as Federal Lease, Billings, Montana, Serial No. 025.001, for oil and gas which are hereinafter described.

8. That the hereinabove mentioned leases are included in the purchase agreement between the plaintiff, Mondakota Gas Company, and the defendant, Industrial Gas, Inc., dated June 20, 1953, and is duly recorded in the records of the County Clerk & Recorder of Fallon County on May 29, 1954, in Book 34 of Misc. records on page 367.

9. That the hereinabove described leases are included in that certain purchase agreement between the plaintiff, Mondakota Gas Company, and one E. R. McElroy, bearing date of June 17, 1952, and duly recorded in the records of the County Clerk & Recorder of Fallon County on January 12, 1953, in Book 30 of Misc. records on page 4, and that said E. R. McElroy duly assigned all of said leases, pursuant to agreement to include said leases within the purchase agreement between the plaintiff and defendant hereinabove mentioned by written

assignment and quit claim bearing date of July 20, 1953, to the defendant Industrial Gas, Inc., which assignment and quit claim was a transfer and assignment of the leases made by partial assignment by the plaintiff to the said E. R. McElroy bearing date of August 11, 1952, which recites that said assignments were made subject to the terms of that certain purchase agreement bearing date of June 17, 1952, hereinabove mentioned.

10. That the plaintiff was the record owner of the leases hereinafter described and which were included in and described in the purchase agreement hereinabove mentioned and as between the parties hereto was the owner of the interest set forth in said lease in the realty dscribed in the said contracts which leases and contracts were duly recorded by reason of the following instruments and documents on file and of record in the office of the County Clerk & Recorder of Fallon County, Montana, and are in full force and effect as follows:

4. A. FEDERAL LEASE, BILLINGS, MONTANA, SERIAL NO. 025 001, base lease dated February 13, 1935, from the United States of America to L. M. Walker filed in the United States Bureau of Land Management records at Billings, Montana.

B. Assignment from Leona M. Walker to Mondakota Gas Co. dated August 25, 1948, and recorded in Fallon County, Montana, County Clerk & Recorders office on January 20, 1949, in Book 21, Misc., page 124.

C. Purchase agreement between Mondakota Gas Co. to E. R. McElroy dated June 17, 1952, recorded in Fallon County, Montana, County Clerk & Recorders office in Book 30, Misc., page 4, on January 12, 1953,

Partial assignment from Mondakota Gas Co. to E. R. McElroy subject to the terms of the purchase agreement dated June 17, 1952, and the assignment was recorded August 11, 1952. The interest in this purchase agreement and lease is assigned to Industrial Gas, Inc. by instrument dated July 20, 1953.

D. Purchase Agreement dated July 20, 1953, from Mondakota Gas Co. to Industrial Gas Co., recorded May 29, 1954, in Fallon County, Montana, County Clerk & Recorders office in Book 34, Misc., page 367.

The Federal Lease property is particularly described as follows, situated in Fallon County, Montana, to-wit: Tract A: The West Half (W½) of the Northeast Quarter (NE¼) and the Southeast of the Northeast Quarter (SENE¼) of Section Twenty-five (25), Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; and Tract B: The Northeast Quarter (NE¼) of the Northeast Quarter (NE¼) of Section Twenty-five (25), in Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; and Lots One (1), Two (2), Three (3) and Four (4), (W½W½), and East Half (E½) of the West Half (W½) of Section Eighteen 18) in Township Eight (8) North, Range Sixty (60) East, M.P.M., subject to the gas unit plan number five (5) covering the gas rights above a depth of 2,000 feet which is the strata commonly known as Judith River Sands and subject to any rights which now may exist under the deep test contract covering the oil rights below 2,000 feet which deep test contract was subleased to Shell Oil Company.

From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. That by reason of the breach of the purchase agreement between plaintiff and defendant, property of the value of $1,019,000.00 has been lost to the plaintiff and the further sum of $23,765.20 has been paid by plaintiff for defendant to plaintiff's damages in that amount and plaintiff is entitled to a judgment against defendant for damages in the said total sum of $1,042,765.20, and that plaintiff is entitled to cancellation and termination of said purchase agreement and to be restored to the ownership, title and right of possession to the leases set forth in Findings of Fact and to the gas wells, casings, meter houses, equipment incident to said gas wells on the three leases set forth in the Findings of Fact, namely: a gas well on the Kraeger Lease, a gas well on the Federal Land Bank of Spokane Lease, and a gas well on the Midland Realty Company of Minneapolis Lease.

JUDGMENT & DECREE

WHEREFORE, by reason of the law and the evidence,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff, Mondakota Gas Company, as follows:

1. That the purchase agreement between Mondakota Gas Company and Industrial Gas, Inc., dated the 20th day of July, 1953, and recorded in Book 34, Misc., page 367, be, and the same hereby is, terminated, cancelled and of no force and effect.

2. That the plaintiff, Mondakota Gas Company, have and recover judgment against the defendant Industrial Gas, Inc., a corporation, in the sum of $1,042,765.20 to-

gether with plaintiff's costs and disbursements herein in the amount of $.

3. That, as between the parties hereto, the plaintiff, Mondakota Gas Company, is the owner of and entitled to the title, right and possession of the oil and gas leases on the realty located in Fallon County, Montana, hereinabove described in paragraph number 10 of the Findings of Fact herein which descriptions are hereby incorporated into this Decree to the rights therein enumerated, together with the producing gas wells on the said Kraeger Lease, Federal Land Bank of Spokane Lease, and Midland Realty Company of Minneapolis Lease, including the casings, meters, meter houses and equipment incident to and included in said three gas wells, and that all of said properties are free and clear of any right, title, interest or claim of the defendant herein.

Done in open court this 12th day of May, 1965.

E. E. FENTON
District Judge